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CAUSE NO. 12,764

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TITUS COUNTY, TEXAS
	§	
BILLY JOE WARDLOW	§	76TH JUDICIAL DISTRICT

STATEMENT OF FACTS

MOTION FOR DISCOVERY, PRODUCTION
AND INSPECTION OF EVIDENCE NO. 1

October 12, 1994

VOLUME 8 of 43 volumes

FILED IN
COURT OF CRIMINAL APPEALS

OCT 11 1995

Troy C. Bennett, Jr., Clerk

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VOLUME 8

MOTION FOR DISCOVERY, PRODUCTION
AND INSPECTION OF EVIDENCE NO. 1

OCTOBER 12, 1994

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VOLUME 8

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1 CAUSE NO. 12,764

2 THE STATE OF TEXAS § IN THE DISTRICT COURT OF
3 VS. § TITUS COUNTY, TEXAS
4 BILLY JOE WARDLOW § 76TH JUDICIAL DISTRICT

5
6 STATEMENT OF FACTS

7 MOTION FOR DISCOVERY, PRODUCTION

8 AND INSPECTION OF EVIDENCE NO. 1

9 October 12, 1994

10 VOLUME 8 of 43 volumes

11
12 Before Honorable Gary R. Stephens

13 Judge by Judicial Assignment

14 (Venue changed from Morris County, Texas)

15
16 APPEARANCES

17
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1 On the 12th day of October, 1994, the
2 above-entitled and numbered cause came on for hearing
3 before said Honorable Court, Judge Gary R. Stephens of
4 Midlothian, Texas, serving by judicial assignment in the
5 District Court of Titus County, Texas, on change of venue
6 from Morris County, Texas, and the following proceedings
7 were had:

8 THE COURT: Let's get on the
9 record.

10 In the case of "The State of Texas Vs.
11 Billy Joe Wardlow" let the record reflect that all of the
12 attorneys and the Defendant are present in the courtroom.

13 When we recessed yesterday Mr. Townsend,
14 I instructed you to comply with Motion for Discovery
15 either in writing or orally.

16 At this time what I would like to do is
17 to go down each numbered item requested by the Defense
18 and have you either state into the record that you have
19 complied with that request or that you haven't because
20 there is no evidence for you to comply with it by stating
21 the answer in the record at this time.

22 "Number 1" is the request for "All
23 confessions, admissions and statements, in writing,
24 signed by the Defendant."

25 Are there any such statements, Mr.

1 Townsend?

2 MR. TOWNSEND: Those were hand
3 delivered this morning, they also have been previously
4 supplied on June 27th of 1994.

5 THE COURT: Okay. Now, Mr.
6 Old, I'm not going to address you during this session.
7 If Mr. Townsend makes a statement that you don't agree
8 with then I will expect you to speak up and say so for
9 the record but I'm not going to ask you each time if it
10 has been supplied, I will assume it has if you are
11 silent, otherwise I will expect to hear from you.

12 The second request is for "All
13 confessions, admissions or oral statements."

14 MR. TOWNSEND: None, your
15 Honor.

16 THE COURT: "3", "All oral,
17 written and recorded statements of the Defendant, and
18 memoranda of said statements made to any investigating
19 officer"

20 MR. TOWNSEND: Those have been
21 hand delivered, too.

22 THE COURT: "4", "All
23 handwritten and typed notes made by all law enforcement
24 officers prior to, during and after the Defendant was
25 interrogated."

1 MR. TOWNSEND: None, Your
2 Honor.

3 THE COURT: "5", "All
4 handwritten and typed notes of the police officers who
5 investigated and participated in any manner in this
6 case."

7 MR. TOWNSEND: Your Honor,
8 those were presented June 27th.

9 THE COURT: "6" is the request
10 for "The names of all suspects who were interrogated
11 and/or arrested in conjunction with this offense."

12 MR. TOWNSEND: There are none,
13 Your Honor.

14 THE COURT: "7", "Any
15 statements, whether written or oral, by the Defendant,
16 all Co-Defendant(s) and Co-Conspirator(s), either
17 indicted or unindicted, which the State of Texas intends
18 to introduce."

19 MR. TOWNSEND: There are
20 letters by the Defendant and those have been hand
21 delivered today as well as presented earlier to the
22 Defendant..

23 THE COURT: "8" requests --

24 MR. OLD: Could we go back to
25 "Number 6?"

1 THE COURT: Yes. "Request 6"
2 is a request for the names of all suspects.

3 MR. OLD: "That were
4 interrogated or arrested."

5 Tonya Fulfer certainly would be one of
6 those.

7 If you define "suspect" as someone who
8 was never charged, by "arrested" she would not, she is
9 a "suspect."

10 THE COURT: Tonya Fulfer,
11 Co-Defendant, right?

12 MR. TOWNSEND: I took "Number
13 6" to be those people who may be interrogated but not
14 charged. Certainly Tonya Fulfer was arrested to my
15 knowledge --

16 THE COURT: Was there anybody
17 else interrogated and arrested other than Tonya and Billy
18 Joe?

19 MR. TOWNSEND: Not to my
20 knowledge, Your Honor.

21 THE COURT: Mr. Old, does that
22 cover it for you or do you have anymore knowledge?

23 MR. OLD: Yes, Your Honor.

24 THE COURT: Let's see, now,
25 I have lost my place. I think we were about to start on

1 "8."

2 "8" is a request for "All statements
3 made by any party or witness to this alleged offense, in
4 the possession of or within the knowledge of the District
5 Attorney or any of his agents, including any law
6 enforcement agency."

7 The request is for statements, either
8 written or oral which might be material for the innocence
9 of the Defendant or to punishment.

10 Mr. Townsend?

11 MR. TOWNSEND: Those were --
12 any such statements were provided on June 27th.

13 THE COURT: Okay.

14 MR. OLD: Your Honor, as to
15 "8", he says, "Any such statement", I would like to know
16 which statement he purports to comply with. "Number 8"
17 could become a matter of opinion of whether they do or
18 do not.

19 MR. TOWNSEND: Let me read
20 "8."

21 THE COURT: All right.

22 MR. TOWNSEND: Your Honor, as
23 to any written statement as to "Number 8", as to any
24 written statements, those were provided, as to any oral
25 statement, I'm not sure exactly what that would --

1 THE COURT: I read it to be
2 a request for any exculpatory evidence, the request is
3 for any evidence material to the innocence of the
4 Defendant or to punishment. I have to assume that the
5 "punishment" means evidence that would be favorable to
6 the Defense for punishment and evidence that is favorable
7 to the Defense Attorney for innocence which would be
8 exculpatory.

9 MR. TOWNSEND: Any statements
10 we have were sent on June 27th, 1994, I didn't consider
11 any of these to be exculpatory.

12 THE COURT: Mr. Old, do you
13 have any questions?

14 MR. OLD: If his answer is
15 there are none as to oral and written of people
16 possessing that knowledge I mean I would have to be
17 satisfied with it. If there are people -- I would like
18 to know what persons he says has that particular
19 knowledge as to innocence or as to punishment evidence.

20 MR. TOWNSEND: I know of no
21 such written or oral statement.

22 THE COURT: Mr. Townsend, if
23 you do become aware of any such statement be sure you
24 advise the Court and the Defense.

25 MR. TOWNSEND: Yes.

1 THE COURT: "9" is "A written
2 transcription of the testimony of all the witnesses who
3 appeared and testified before the Grand Jury."

4 MR. TOWNSEND: There was no
5 transcript taken, Your Honor.

6 THE COURT: Was there
7 testimony before the Grand Jury?

8 MR. TOWNSEND: There was
9 testimony before the Grand Jury.

10 THE COURT: But there was no
11 Court Reporter?

12 MR. TOWNSEND: There was no
13 Court Reporter, which is the way we standardly do it.

14 THE COURT: Then I assume the
15 answer to "9" is that it does not exist?

16 MR. TOWNSEND: Yes, Your
17 Honor.

18 THE COURT: "10" is a request
19 for "All objects and tangible property alleged by the
20 State to have been taken or used by the Defendant or any
21 Co-Conspirator during the course of the commission of the
22 offense."

23 MR. TOWNSEND: Your Honor, the
24 only object or tangible property that I can think of in
25 that regard would be the pickup truck which we have got

1 pictures of. That truck has been turned back into the
2 possession of the victim's family.

3 THE COURT: You are referring
4 to the truck that allegedly the Defendant was attempting
5 to steal or did steal?

6 MR. TOWNSEND: Yes, Your
7 Honor. We have pictures of that, those photographs along
8 with any other photographs are either in my office or the
9 Sheriff's Department. We can provide those for Bird to
10 view at his convenience.

11 THE COURT: All right.

12 MR. TOWNSEND: Also there is
13 a gun allegedly used by the Defendant, it as well is in
14 the possession of the Sheriff's Department and we can
15 make that available to Mr. Old.

16 THE COURT: Mr. Old, if you
17 wish to view the weapon or the photographs make
18 arrangement with Mr. Townsend.

19 That covers "10" and "11."

20 MR. OLD: Your Honor, as to
21 "10", I may be overstepping what I'm asking, I am -- I
22 welcome criticism if I am out of order.

23 They have not alleged the manner or
24 means of the robbery and based on your statement and your
25 questions to him it appears that the Statute cites it as

1 "tangible property."

2 Is that tangible property that was the
3 subject of the robbery the pickup truck?

4 MR. TOWNSEND: I believe
5 that's what it says in it.

6 MR. OLD: No. It does not
7 state in it, it alleges a robbery, it does not allege
8 what --

9 MR. TOWNSEND: I don't think
10 we are required to allege that in the indictment but
11 anyway, yes.

12 MR. OLD: I think he's
13 required to allege the manner and means in which it was
14 committed but I mean, that's the subject of another
15 motion.

16 THE COURT: Yes. I believe
17 that would be for another motion.

18 But if I understand what Mr. Old is
19 getting to, Mr. Townsend, if you were required to plead
20 more specifically the robbery that you are alleging was
21 the robbery or attempted robbery of Mr. Cole and the
22 property taken or to be taken was only the pickup truck,
23 is that correct?

24 MR. TOWNSEND: Well, you know,
25 I think the evidence will show the pickup truck and also

1 some money.

2 THE COURT: But no other
3 tangible object other than the truck and money and
4 whatever might have been physically inside the truck?

5 MR. TOWNSEND: That's the only
6 tangible property that was involved in -- during the
7 course of commission of the offense.

8 Now, there is also pictures that have
9 been taken of tangible property that was found in the
10 possession of the Defendant and Co-Defendant, you know,
11 when they were at the motel room they were staying in.
12 Those were, however, you know, we have pictures of those.
13 They are available.

14 However, I didn't consider them part of
15 "Number 10" because they are not really -- I didn't
16 consider those things to have been taken or used during
17 the course of the offense. If there was items that were
18 with the parties when they were arrested.

19 THE COURT: Were these items
20 allegedly owned by Mr. Cole or by other parties?

21 MR. TOWNSEND: No. They are
22 not alleged to have been owned by Mr. Cole.

23 THE COURT: Mr. Old, does that
24 answer your question?

25 MR. OLD: I mean --

1 MR. TOWNSEND: Your Honor,
2 also there was some items found on the side of the road
3 Mr. Bird Old is aware of those, there were items found
4 such as a checkbook that belongs to the victim, just some
5 various items that came out of his pickup. We have
6 pictures of those, Mr. Old has access to those
7 photographs.

8 THE COURT: Make available to
9 Mr. Old the photographs of any property that was
10 recovered during this arrest or physical exhibition of
11 any property if you don't have photographs.

12 MR. TOWNSEND: That's no
13 problem.

14 THE COURT: "11" has been
15 covered, you say you have a weapon in possession that you
16 allege to have been used?

17 MR. TOWNSEND: Yes, Your
18 Honor.

19 THE COURT: "12" is a request
20 for "All articles of clothing, including shirts, pants,
21 undergarments and shoes allegedly belonging to the
22 Defendant and to the Decedent."

23 MR. TOWNSEND: There's a few
24 such items, Your Honor, and they are in possession of the
25 Morris County Sheriff's Department.

1 Mr. Old can view those at his
2 convenience.

3 THE COURT: "13" is a request
4 for "All contraband, drugs, controlled substances and
5 paraphernalia which were seized as a result of the
6 investigation of this case."

7 MR. TOWNSEND: There were no
8 contraband, drugs, there were no controlled substance and
9 when it says "paraphernalia" I assume it means "drug
10 paraphernalia."

11 THE COURT: That's the way I
12 would interpret it.

13 MR. TOWNSEND: There was no
14 drug paraphernalia.

15 THE COURT: That answers "13."
16 "14" is a request for "All documents,
17 papers, books, accounts, letters, objects and tangible
18 things which are the property of the Defendant and which
19 are in the possession of the prosecutor."

20 MR. TOWNSEND: All letters and
21 that sort of thing would have been hand -- hand delivered
22 today as well as on June 27th of '94.

23 As to tangible things such as clothes
24 that we have already covered those things, would be in
25 the custody of the Sheriff's Department.

1 THE COURT: And you will make
2 it -- inspection available?

3 MR. TOWNSEND: They will be
4 able to view it.

5 THE COURT: "15" is a request
6 for "Books, papers, letters and objects taken, tangible
7 things in possession of the prosecutor that came into
8 your possession as the result of the investigation and
9 are material to the Defendant's innocence."

10 I think that probably is covered by
11 "14", I mean you have already offered to show him
12 everything you have, whether it's exculpatory or not?

13 MR. TOWNSEND: Yes, Your
14 Honor. That's true. I know of none that would be
15 exculpatory but he's welcome to look at what we have got.

16 THE COURT: "16" is a request
17 for "written waiver alleged by the State to have been
18 signed by the Defendant concerning the Defendant's right
19 to counsel prior to the making of any written and oral
20 statements by the Defendant."

21 Do you have anything?

22 MR. TOWNSEND: None.

23 THE COURT: "17" is a request
24 for written consent to search, did you have a written
25 consent?

1 MR. TOWNSEND: There was a
2 written consent to search that involved the Defendant's
3 automobile and his motel room that was sent on -- sent
4 on June 27th, 1994.

5 THE COURT: "18" is a request
6 for "The search warrant and arrest warrant and affidavits
7 in support thereof."

8 Did you have a search and arrest warrant
9 and affidavit?

10 MR. TOWNSEND: Those were
11 also, Your Honor, yes, and they were sent on June 27th,
12 1994.

13 MR. OLD: Your Honor, in that
14 regard I have one which I presume or it appears the
15 arrest was made under -- in writing -- it appears, and
16 I'm not saying, it appears, I -- there may have been
17 other warrants and other affidavits to support warrants
18 other than the one you supplied.

19 MR. TOWNSEND: Is what you
20 have entitled an "Arrest Warrant" or "Search Warrant",
21 do you remember?

22 MR. OLD: I can look.

23 THE COURT: Mr. Townsend, at
24 the break why don't you get together with Mr. Old and
25 take a look at what he has as far as the search and

1 arrest warrant, if you have any additional search
2 warrants or arrest warrants or affidavits provide them
3 to Mr. Old.

4 MR. TOWNSEND: Okay.

5 THE COURT: "19" is a request
6 for "All photographs, drawings and charts made by the
7 agent of the District Attorney's Office or any law
8 enforcement agency, which were made with reference to
9 this case."

10 MR. TOWNSEND: Any such items
11 are either in my possession or in possession of the
12 Morris County Sheriff's Department and can be viewed at
13 Mr. Old's convenience.

14 MR. OLD: Are there such
15 items?

16 MR. TOWNSEND: There is a
17 drawing of the victim's home area that was not -- it's
18 a drawing of the victim's area, that is the Cason area
19 that has not been completed yet. We will make access to
20 that once it is.

21 There are several photographs of the
22 victim's home, photographs of the location where the
23 victim's checkbook and other personal items belonging to
24 the victim were found, several photographs of that type
25 nature that I have that can be viewed at Mr. Old's

1 convenience.

2 MR. OLD: As to the drawing
3 that you are speaking of that is incomplete, is that
4 something that is being professionally done?

5 MR. TOWNSEND: It's just a
6 matter of we have a scale map of the Cason area but it's
7 not very large and where we need to get it blown up and
8 you are free to come look at it as it is but once we get
9 to trial we'll have it in a larger size.

10 THE COURT: "19" and "20" and
11 "21" are -- excuse me, "20" and "21" are requests for
12 photographs of the Defendant, provide any photographs of
13 the Defendant you have in your possession, whether they
14 were taken in reference to this case or investigation of
15 this case or any prior picture if they were used for
16 identification purposes.

17 MR. TOWNSEND: Okay. On
18 "Number 20", "Photographs of the Decedent", we have a few
19 of those.

20 Mr. Old can view those at his
21 convenience.

22 "21", "Photographs of the Defendant",
23 same way, we have a few photographs and can be viewed.

24 THE COURT: From what you are
25 telling me you have -- you will let Mr. Old look at --

1 MR. TOWNSEND: No problem.

2 THE COURT: "22" is a request
3 for fingerprints, palm prints, footprints and reports
4 with respect to the prints alleged by the State to have
5 been made by the Defendant or Co-Defendant.

6 MR. TOWNSEND: There are no
7 prints of that nature, Your Honor.

8 MR. OLD: Your Honor, as to
9 that may I inquire that you are telling me the officer
10 that investigated this did not attempt to lift any prints
11 from the scene?

12 MR. TOWNSEND: I believe the
13 officers may have made some attempt of that nature but
14 any attempt they made and any prints that were found
15 would be reflected in the officer's report which you have
16 copies of but --

17 MR. OLD: You are saying
18 there's none to your knowledge?

19 MR. TOWNSEND: None. No
20 makeable fingerprints, palm prints and when you -- I
21 don't believe footprints, either but I'm not certain
22 about that either but I don't believe there are any
23 footprints but anyway they are all contained in the
24 officer's report which you have, whatever you have on
25 that and I'm certain there are no fingerprints or palm

1 prints.

2 MR. OLD: Your Honor, I could
3 have missed or forgotten it, I don't find any of that in
4 the records that I have and what I want on that in
5 response to that is either "None exist" or be pointed out
6 where they are because I have not discovered any --

7 MR. TOWNSEND: If you are
8 asking --

9 MR. OLD: -- in the
10 information that you supplied me.

11 THE COURT: I believe he
12 already said that none exist.

13 MR. OLD: Well, he indicated
14 that then hedged and said "If there are any they are in
15 the reports that you -- "

16 THE COURT: I think what he
17 was saying, and correct me if I am wrong --

18 MR. TOWNSEND: I'm saying none
19 exist to my knowledge but if I have overlooked something
20 it would certainly be contained in the officer's report.

21 THE COURT: You told me no
22 prints exist, I thought you were talking about any
23 attempt to remove prints would be reflected.

24 MR. TOWNSEND: I think there
25 were Upshur County officers who came out and assisted and

1 I don't know that they necessarily, you know, looked over
2 wide areas around that house for prints but they did do
3 some -- did make some attempt at looking for certain
4 items and I'm not aware of exactly what they looked for
5 but I know there were no fingerprints of Billy Wardlow
6 or fingerprints of the other Co-Defendant that were
7 located.

8 I can get, I am sure I could get a
9 report from those folks in Upshur County but I think this
10 report is basically going to be, you know, no evidence.

11 MR. OLD: I don't think you
12 have provided that report.

13 MR. TOWNSEND: I don't think
14 I have that report.

15 MR. OLD: I mean, I have read
16 a lot of officer's reports and I'm not going to sit here
17 and say what I read.

18 MR. TOWNSEND: I think you are
19 probably right. I don't think I have any such report.

20 MR. OLD: Were they scientific
21 investigators that came to the scene?

22 MR. TOWNSEND: I believe
23 that's right.

24 MR. OLD: They have a team?

25 MR. TOWNSEND: They kind of

1 have a team in Upshur County who works that sort of
2 thing, that was who was over there. There was two or
3 three guys and I don't remember their names.

4 THE COURT: "23" is the
5 request for reports of scientific tests and experiments.

6 So, Mr. Townsend, check with whoever
7 made what attempt, whoever that team was that went in to
8 try to lift prints and make reports, find out who they
9 were and let us know whether anything was recovered, any
10 reports were made and if so, of course copies of the
11 reports.

12 MR. TOWNSEND: Okay, Your
13 Honor. I can check on that this afternoon if we get
14 through earlier.

15 THE COURT: At this point
16 based on what you have said you have no fingerprint, palm
17 print or footprint evidence that you intend to use and
18 if I hear such evidence I will exclude it since you have
19 told me it doesn't exist.

20 MR. TOWNSEND: I don't have
21 any, Your Honor.

22 THE COURT: Let's go to "24".
23 Again, it's a request for "Reports of scientific tests,
24 experiments and comparisons, including but not limited
25 to reports pertaining to weapons, bullets, shots,

1 waddings, cartridge cases."

2 Have you -- do you have in your
3 possession any scientific tests?

4 MR. TOWNSEND: We have
5 scientific testing regarding the weapon that was alleged
6 to have been used and the bullet recovered from the
7 victim's -- from the victim's body that -- the test
8 results of that test and the reports have been provided
9 to Mr. Old on June 27th of '94.

10 The autopsy report which I'm not sure
11 that is covered.

12 THE COURT: That's the next
13 request.

14 MR. TOWNSEND: Anyway, the
15 autopsy report has also been provided Mr. Old on June
16 27th.

17 There is a handwriting expert who has
18 examined some handwriting, both the handwriting samples
19 from the Defendant and handwritten letters allegedly
20 written by the Defendant and there is one report from
21 that handwriting expert that has been provided to Mr. Old
22 today.

23 I believe it was also provided earlier
24 but it's provided today.

25 There is another, further handwriting

1 test from the same handwriting expert where he has tested
2 some letters that we have received.

3 After he completed the first test we did
4 not have the report from that test yet.

5 I expect to receive that report within
6 the next few days and will certainly provide it at that
7 time.

8 THE COURT: That gets us to
9 "26."

10 "25", you covered the autopsy report.

11 "26" is a request for "Medical reports
12 which show or tend to show the physical condition of the
13 Decedent."

14 MR. TOWNSEND: We have no such
15 report.

16 THE COURT: "27" is a request
17 for the blood type of the Decedent.

18 MR. TOWNSEND: We do not have
19 that knowledge but that's in the autopsy and I think it
20 probably --

21 THE COURT: It should be.

22 So you don't have any independent?

23 MR. TOWNSEND: We don't have
24 any independent knowledge.

25 THE COURT: "28" is a request

1 for medical and psychiatric reports submitted by any
2 doctor at the request of the State in conjunction with
3 the examination of the Defendant, the Decedent and all
4 State's witnesses.

5 That's a little broad but it has been
6 granted so --

7 MR. TOWNSEND: None of it
8 exists, Your Honor, except the autopsy.

9 THE COURT: So you have not
10 had Mr. Wardlow examined?

11 MR. TOWNSEND: No. We have
12 not, Your Honor.

13 MR. OLD: So as to Tonya
14 Fulfer, do you have any psychiatric or mental reports of
15 any kind on her?

16 MR. TOWNSEND: We have not had
17 her tested, Your Honor.

18 I think maybe her attorney may have had
19 her tested but we have not and I have not had access to
20 any findings he may have.

21 THE COURT: "29" is a request
22 for "All evidence as to the incompetency of the Defendant
23 to stand trial which is in the State's possession."

24 Do you have any such knowledge or
25 evidence?

1 MR. TOWNSEND: We have none,
2 Your Honor.

3 THE COURT: "30." "30" is a
4 request for evidence as to insanity of the Defendant at
5 the time of the alleged offense.

6 Do you have any such?

7 MR. TOWNSEND: We have none,
8 Your Honor.

9 THE COURT: "31" is a request
10 for photographs made of all line-ups conducted in this
11 case.

12 Did you have a line-up?

13 MR. TOWNSEND: There was not
14 a line-up.

15 THE COURT: So you have no
16 line-up photos?

17 MR. TOWNSEND: No.

18 THE COURT: "32" is a request
19 for a police form used by law enforcement to identify
20 participants in the line-up.

21 There was no line-up so "32" and "33"
22 do not apply.

23 "34" is a request for prior criminal
24 records of the Defendant, Co-Defendant, Decedent, each
25 informant and State's witnesses requesting juvenile,

1 adult felony and misdemeanor.

2 Do you have any such evidence?

3 MR. TOWNSEND: "Prior criminal
4 record of the following persons?"

5 Okay. The Defendant, that has been
6 provided to Mr. Old and as to the Co-Defendant there is
7 only one Co-Defendant that we know of, no prior criminal
8 record on her.

9 Co-Conspirator, that would be the same
10 response.

11 The Decedent had no prior criminal
12 record that we are aware of.

13 There was no informant so there's
14 nothing there.

15 As to all the State's witnesses, on June
16 27th Mr. Old was provided with criminal records of any
17 of the State's witnesses that we were aware of other than
18 Jimmy Stewart and Joe McKinney and that has been hand
19 delivered to him this morning.

20 And I want to correct one thing, I don't
21 remember if this was said on the record yet or off the
22 record, I think I said it yesterday that I thought Joe
23 McKinney was in TDC, in fact he has just recently been
24 paroled and that's reflected in the letter I gave to Mr.
25 Old. He has been paroled and we have an address on him.

1 THE COURT: Is he in this
2 area?

3 MR. TOWNSEND: Yes. He's in
4 Morris County I believe but anyway it's reflected in the
5 letter.

6 Jimmy Stewart who I did not think was
7 in TDC but I did not know where he was, I found out he
8 was in TDC.

9 MR. OLD: Where in TDC?

10 MR. TOWNSEND: That I don't
11 know because I just found out yesterday afternoon he's
12 in TDC.

13 THE COURT: I think that's
14 information that the Defense can get as easily as the
15 State. If you can't I will order the State to get that
16 information for you, Mr. Old.

17 Okay. That gets us down to "35", a
18 written specification of all prior misconduct and
19 evidence of extraneous offense(s) which the State intends
20 to use against the Defendant.

21 MR. TOWNSEND: That was a more
22 detailed list than what I gave him yesterday that I had
23 had written out, I hand delivered to him this morning.
24 In fact those offenses with the exception of one were
25 offenses that he has had the reports on since June 27th.

1 THE COURT: But you now have
2 specified in writing all of the misconduct and extraneous
3 offenses that you intend to use during this trial?

4 MR. TOWNSEND: Yes, Your
5 Honor.

6 THE COURT: "36" is a request
7 that the prosecutor identify the location of recovery of
8 all items provided to the Defendant.

9 MR. TOWNSEND: I had a
10 question on that, I wasn't -- I wasn't sure exactly what
11 that meant.

12 Does that require -- to identify the
13 location, that is just --

14 THE COURT: It's misworded.

15 MR. TOWNSEND: I have a
16 question about that. I think we have -- I think all of
17 our officer reports and so on would certainly indicate
18 that location of any item that was recovered such as
19 bullet or gun or clothing, you know, whatever those items
20 might be. I think that the Offense Report would
21 certainly reflect that.

22 If there's any item that Mr. Old or Mr.
23 Hinson is aware of from the report that it is not clear
24 where those items were recovered I will try to look into
25 that.

1 THE COURT: After reading this
2 I think it has become clearer to me. I didn't understand
3 it when I first read it but whenever Mr. Old is looking
4 at whatever item you are going to produce if there's any
5 question as to where they are recovered then I assume
6 that the District Attorney's Office will provide any
7 information Mr. Old needs.

8 So Mr. Old, if you do not have the
9 information as to the recovery of the item you are going
10 to view or have viewed request that information from Mr.
11 Townsend if it's not clear from the object or the report
12 you have in your possession.

13 "37" is a request that the State make
14 inquiry to disclose all of the following, "all records
15 and information showing a prior criminal record in state
16 or federal courts of all state's witnesses."

17 MR. TOWNSEND: I think that's
18 covered under -- before, Your Honor.

19 THE COURT: We have covered
20 it.

21 "b" requests "All records and
22 information revealing prior misconduct of all State's
23 witnesses."

24 MR. TOWNSEND: That's not
25 specifically under "Number 34" but we do know of no such

1 misconduct or bad acts unless they are covered in
2 convictions.

3 THE COURT: If you discover
4 any prior misconduct or bad acts that are not covered by
5 conviction inform Mr. Old.

6 MR. TOWNSEND: Okay.

7 THE COURT: "6" -- I don't
8 know where I come up, try "c."

9 "c", "All 'consideration' or promises
10 of 'consideration' given to or on behalf of the State's
11 witnesses."

12 MR. TOWNSEND: That
13 information was, the only consideration or promises of
14 consideration involved are contained in the letter that
15 Mr. Old received on the 6th of October of '94 in
16 relation --

17 THE COURT: That was the
18 discussion I assume we had yesterday concerning the fact
19 that she's going to plead guilty to the lesser offense
20 of murder, have the jury assess punishment.

21 MR. OLD: For purposes of the
22 record I stated yesterday that I thought I received that
23 letter on Thursday afternoon, I was incorrect in that I
24 would like to mark a copy of the letter and offer it as
25 evidence for purposes of this hearing.

1 And in fact that letter left Mr.
2 Townsend's office on October the 6th.

3 Let me get it marked.

4
5 (Defendant's Pre-Trial Exhibit Number
6 1 was marked for identification.)

7
8 MR. TOWNSEND: No objection,
9 Your Honor.

10 MR. OLD: Your Honor, we would
11 offer "DPTX1."

12 THE COURT: Defendant's Pre-
13 Trial Exhibit 1 is admitted.

14
15 (Defendant's Pre-Trial Exhibit Number
16 1 was received in evidence.)

17
18 MR. OLD: Will the Court
19 take judicial notice that October 6th was last Thursday,
20 in addition to that take judicial notice of the fact that
21 -- that is the date that we began voir dire in this case?

22 THE COURT: I will take
23 judicial notice. So far as voir dire is concerned, that
24 was the day we did our general voir dire, there was no
25 specific voir dire.

1 Yes. I will take notice as requested.

2 MR. OLD: In addition to that
3 on the record I would like to correct my statement, it
4 was after lunch on Friday that I received this, received
5 this in place of "Thursday" but based on what the date
6 the letter was mailed that would have to be correct.

7 MR. TOWNSEND: Your Honor, may
8 I also point out for the record that the individual jury
9 selection where either Mr. Old or Mr. Hinson or myself
10 and Mr. Lee would have been talking to the jury panel did
11 not -- would not have began until four days later?

12 THE COURT: I believe the
13 record will reflect that no one had addressed this jury
14 concerning this case or prospective jurors concerning
15 this case except the Court through today which is October
16 12th.

17 All right. The next is --

18 MR. OLD: Can we go back just
19 a minute?

20 My inquiry as to "consideration", what
21 is the consideration to Tonya Fulfer for her plea?

22 MR. TOWNSEND: "The
23 consideration?"

24 MR. OLD: Yes. The promise,
25 her promise quid pro quo?

1 MR. TOWNSEND: The promise
2 is that I have agreed to allow her to plead guilty and
3 go -- to murder and go to the jury and allow the jury to
4 assess the punishment if she testifies if -- or if she
5 agrees to testify in this case.

6 MR. OLD: For her agreement
7 to testify in this case to?

8 MR. TOWNSEND: As to what she
9 truthfully knows about this case.

10 MR. OLD: Her agreement is to
11 testify and cooperate?

12 MR. TOWNSEND: And tell the
13 truth as to what she knows about this case, assuming she
14 is called as a witness.

15 THE COURT: So what you are
16 telling me, Mr. Townsend, is it correct, is a reduction
17 of the charge from "Capital Murder" to "Murder" in
18 exchange for her cooperation?

19 MR. TOWNSEND: Yes.

20 THE COURT: I think that
21 covers it.

22 Anything else on that issue, Mr. Old?

23 MR. OLD: Not at this time,
24 Your Honor.

25 MR. HINSON: Your Honor, could

1 I ask one question?

2 THE COURT: Yes.

3 MR. HINSON: Have there been
4 any considerations to jail inmates that have given
5 statements in this case?

6 Have any of these inmates plead to any
7 charge since the time they made any statement?

8 MR. TOWNSEND: If you look
9 through the written statements I don't think there's any
10 written statements from the jail inmates.

11 MR. HINSON: Well, there is
12 a statement from police officers that recollect what
13 prisoners told them.

14 MR. TOWNSEND: What prisoners
15 told them, yes, but there certainly were no agreements
16 made with those jail inmates before they talked to
17 officers. They had not been any agreement made with
18 those jail inmates and since they talked to officers, as
19 of this date there's no agreement with any jail inmate
20 on anything involving this trial or anything else and I
21 don't anticipate any agreement but if there is any
22 agreement made with anyone I will certainly let the Court
23 -- make the Court and Mr. Old and Mr. Hinson aware of
24 that.

25 THE COURT: Do you think that

1 covers it?

2 MR. OLD: I would like to make
3 one more inquiry as to Stewart and the man paroled from
4 the penitentiary was "Stewart?"

5 MR. TOWNSEND: I'm sorry, I
6 was talking to Randy.

7 MR. OLD: The witness you
8 mentioned yesterday -- McKinney who has now been paroled?

9 MR. TOWNSEND: Yes.

10 MR. OLD: It is my
11 understanding that you received notice that they are
12 coming up for parole and you have the opportunity to
13 express your opinion about their parole.

14 MR. TOWNSEND: Generally --
15 if I received notice on Joe McKinney I don't recall
16 receiving it -- because, like I said, I -- until I got
17 back to the office yesterday I was of the opinion that
18 he was in TDC.

19 MR. OLD: I'm not criticizing
20 you for not wanting to rely on your recollection in such
21 a matter, I would say that in the event that you did not
22 act or acted in his favor that would be evidence of a
23 favor.

24 MR. TOWNSEND: Your Honor, I
25 did not do -- I have not talked to Joe McKinney, I have

1 not talked to anyone representing Joe McKinney or make
2 any agreement with him. I have not even discussed his
3 testimony with Joe McKinney.

4 THE COURT: Mr. Townsend, I
5 think what Mr. Old is getting at, I assume in this county
6 that the District Attorney receives a letter stating that
7 an inmate is about to be paroled, gives you an
8 opportunity to object if you wish or to give any good
9 statement if you wish.

10 MR. LEE: Most of those
11 statements are made at the time of the plea bargain on
12 the forms that go into the penitentiary. They have
13 changed the system now, we do not have a recommendation.
14 When they come up for parole they give us notice of
15 parole but we get no input.

16 MR. TOWNSEND: That's the way
17 we do it, too.

18 THE COURT: You have not done
19 anything to help or hurt Mr. McKinney? You have not made
20 any effort to cooperate or not cooperate with McKinney
21 in the case, no more so than any other inmate sent to
22 TDC?

23 MR. TOWNSEND: None whatever.

24 MR. OLD: But you did make a
25 recommendation when the packet went into the system?

1 MR. TOWNSEND: When the packet
2 goes into the system there is also a slot that says "I
3 recommend parole" or "I do not recommend parole."

4 I can tell you for certain without
5 specifically recalling it, I can tell you for certain my
6 answer to that was "I do not recommend parole."

7 Because that is always my answer.

8 MR. OLD: Can we have that
9 document, Your Honor?

10 THE COURT: Do you have a copy
11 of the document?

12 MR. TOWNSEND: The Texas
13 Department of Corrections would have a copy of it.

14 THE COURT: Then you will need
15 to subpoena those documents, Mr. Old.

16 Would those, this recommendation be made
17 before or after Mr. Wardlow was arrested?

18 MR. TOWNSEND: That I'm not
19 sure about not. It would have been made -- it clearly
20 would have been made before I contemplated using Mr.
21 McKinney as a witness because I only began contemplating
22 him as a witness a few days ago.

23 MR. OLD: The incident that
24 he supposedly has knowledge of, was his plea before or
25 after that time?

1 MR. TOWNSEND: I can't
2 honestly tell you for certain. I believe -- this is
3 based on memory and this might be incorrect, I believe
4 he was in jail at that time on a felony revocation of
5 probation. I believe that's right.

6 And I believe that probably subsequent
7 to it, could have been, you know, either subsequent to
8 that time he plead true and took his 10 years or five
9 years or whatever it was that he was on probation and
10 revoked for that number of years.

11 Now, it's probable that he had already
12 been revoked and was just in Morris County Jail awaiting
13 a trip to TDC when this happened but I don't know. I
14 couldn't honestly tell you for certain.

15 THE COURT: Check the dates
16 of Mr. McKinney's plea.

17 Apparently he went to TDC on a probation
18 revocation, is that correct?

19 MR. TOWNSEND: I believe
20 that's correct.

21 THE COURT: Check your
22 records.

23 MR. TOWNSEND: I can check and
24 find out. I believe that's correct.

25 THE COURT: Find out what got

1 him in TDC, what -- when the deal, if any, was made, what
2 he got when he was sentenced and if you have a note of
3 your recommendation, otherwise I'm not going to request
4 you to get it from TDC. I think that's something that
5 can be obtained by subpoena if relevant.

6 MR. TOWNSEND: Yes, Your
7 Honor. I will check on it.

8 THE COURT: Let's see, we are
9 down to "d", a request for "documents, records, memoranda
10 and notes reflecting the 'consideration'."

11 I think we have pretty well covered
12 that.

13 "e" is the request for "any and all
14 threats, express or implied, direct or indirect, or other
15 coercion made or directed against the witness or
16 potential -- "

17 I am not sure I understand what he's
18 asking for, let me read this silently.

19 Mr. Townsend, have you threatened any
20 potential witness to gain their cooperation?

21 By "threaten", I mean indicate that if
22 they don't cooperate with you that they would receive a
23 heavier sentence in some other offense or that you would
24 turn them in for tax fraud or any other such coercion?

25 MR. TOWNSEND: There have been

1 no threats implied, Your Honor, direct or indirect.

2 THE COURT: So when you are
3 stating "he" or the "State's agent", I didn't include
4 that, but any State's agent under authority, control or
5 to your knowledge?

6 MR. TOWNSEND: No threats from
7 anyone that I'm aware of, Your Honor.

8 THE COURT: "f" is the request
9 for "the existence and identification of each occasion
10 on which each witness who was or is an informer,
11 accomplice or co-conspirator or expert has testified
12 before any Court, Grand Jury or other tribunal or body."

13 MR. TOWNSEND: First off,
14 there's no "informer."

15 "Accomplice", I don't believe the
16 accomplice has ever testified anywhere that I'm aware of,
17 "co-conspirator", same as "accomplice", "expert", there
18 would be a firearm expert, there will be a handwriting
19 expert, I am sure they have testified in court in other
20 places but I'm not aware of where or when and I believe
21 the Defense can get that information from those folks as
22 easily as I could.

23 THE COURT: Provided if you
24 haven't done so, let Mr. Old know who your expert
25 witnesses are and then if you have a resume on your

1 experts provide a copy of that resume.

2 Other than that I don't -- I'm not going
3 to order the State to have a discussion to get all their
4 history on testifying. If you know it you can provide
5 it to Mr. Old, otherwise if you give Mr. Old the name and
6 addresses of the expert he may talk to them himself and
7 find out what their experience is.

8 MR. TOWNSEND: I believe the
9 record reflects their names and addresses, phone numbers,
10 that sort of thing.

11 THE COURT: Okay. "g" is a
12 request for "existence and identification of each
13 occasion on which each witness who was or is an informer,
14 accomplice, co-conspirator or expert has testified before
15 any Court or Grand Jury."

16 That's the same thing.

17 MR. TOWNSEND: Looks the same
18 to me.

19 THE COURT: Same to me. We
20 have covered that.

21 "h" requests for "personnel files of the
22 witness, the existence and identity of all federal, state
23 and local government files of the witness and the
24 existence and identity of all official internal affairs,
25 internal investigation or public integrity

1 investigations."

2 I'll tell you, I know that Judge Thorpe
3 has already granted this order but if you have any
4 information I'm ordering that it be given to the Court
5 in camera if it has not already been given to the
6 Defense.

7 MR. TOWNSEND: Your Honor, I'm
8 not aware of any public integrity investigations of any
9 of the officers. Certainly they have personnel files but
10 I don't know of anything in those personnel files that
11 wouldn't be routine.

12 THE COURT: This is a request
13 for personnel files only as it relates to an
14 investigation of public integrity, the way I read it.
15 So if you don't have any such information then --

16 MR. TOWNSEND: I know of no
17 such information.

18 THE COURT: If you become
19 aware of it let me know and give me the information in
20 camera.

21 Mr. Old, do you have any further
22 requests?

23 MR. OLD: In that regard, Your
24 Honor, some of the officers that have been listed as
25 witnesses in this case are out of state officers from

1 different states, I have no knowledge of them.

2 What I think it contemplates is Mr.
3 Townsend inquiring as to those things and supplying them
4 if they exist. And I'm not saying he has not done it,
5 I'm saying he might without investigation be able to
6 answer as to local officers but I have no knowledge of
7 those people and no way to investigate them so far as
8 being out of state.

9 THE COURT: If you have out
10 of state witnesses inquire as to whether or not they have
11 ever had an internal affairs investigation concerning
12 public integrity and criminal investigation.

13 I'm not asking you to get those files,
14 I'm just asking you to inquire as to whether or not any
15 of your witnesses have an internal affairs investigation
16 pending or previously had one that has been closed.

17 If you do then I will consider whether
18 or not those files need to be revealed to the Court, I
19 think it might be very difficult to obtain on an out of
20 state witness.

21 MR. TOWNSEND: Your Honor, I
22 will make necessary phone calls to find out if there is
23 any such information available.

24 THE COURT: The next is
25 basically a request for anything you have that will help

1 the Defense.

2 MR. TOWNSEND: I don't believe
3 I have got anything that will help them, Your Honor.

4 THE COURT: And then "j" is
5 a request for all the same records and information with
6 each non-witness whose statements are offered in
7 evidence.

8 Do you have any non-witness that item
9 or -- I don't know how we would get them, do you have any
10 statement from a non-witness that you are going to
11 attempt to introduce?

12 MR. TOWNSEND: Your Honor, any
13 statements we have are contained in the police report and
14 they have anything that we have.

15 THE COURT: The request,
16 though, is for the records and information on any of
17 those non-witnesses. If you have a non-witness whose
18 statement that you are going to use that you are not
19 going to physically use -- I don't know how you would get
20 it in but I'm sure whoever wrote that motion is just
21 trying to cover himself.

22 MR. TOWNSEND: Sounds like
23 hearsay to me.

24 THE COURT: Does to me, too.

25 MR. OLD: Perhaps a dying

1 declaration.

2 THE COURT: It could be a
3 dying declaration, that would probably be admissable.

4 MR. TOWNSEND: We don't have
5 a dying declaration.

6 THE COURT: You have no plan
7 to offer any statement that you want to introduce that
8 wouldn't be reported by a public witness on the stand?

9 We are now to "38."

10 MR. TOWNSEND: I believe "38a"
11 through whatever, all that has to do with an informer and
12 there is no informer.

13 THE COURT: That covers the
14 Motion for Discovery.

15 Mr. Old, do you have any other request
16 for discovery that is not included in this written
17 motion?

18 MR. OLD: I believe there is
19 some other motions that you might characterize as
20 "motions for discovery", such as "Witness List" and
21 things.

22 THE COURT: I believe you have
23 been provided that.

24 MR. OLD: As to that kind of
25 Motion for Discovery, no.

1 THE COURT: If there's any
2 other motion that you need me to review and rule on I
3 will expect you to bring it to my attention since
4 apparently Judge Thorpe has already had a pre-trial
5 motion hearing so any motions that need to be ruled on
6 for the State or Defense need to be brought to my
7 attention by the State and Defense.

8 MR. OLD: Pre-Trial motions
9 are of a discovery nature?

10 THE COURT: "Pre-Trial
11 motions" period.

12 MR. OLD: We have --

13 THE COURT: I'm not saying we
14 are going to do it at this time but I need to be made
15 aware of motions that need ruling on.

16 MR. OLD: We have a Motion to
17 Quash the Indictment, a Motion to Suppress Evidence
18 Seized After an Illegal Arrest, I believe those are the
19 two live motions that we have and I anticipate after --
20 sometime today or tomorrow filing another motion which
21 would be as to matters that came up yesterday.

22 THE COURT: All right. So at
23 this point I have two pending motions filed by the
24 Defense that have not had rulings, that's a Motion to
25 Quash the Indictment and Motion to Suppress Evidence?

1 MR. OLD: Yes, Your Honor.

2 THE COURT: And then any other
3 motions you will make in writing and provide them to the
4 Court?

5 MR. OLD: Yes.

6 THE COURT: Mr. Townsend, do
7 you have any motions that are pending in this trial that
8 have not been ruled on?

9 MR. TOWNSEND: I don't believe
10 so, Your Honor.

11 THE COURT: That gets us back
12 to the Request for a Continuance made yesterday by the
13 Defense based on what I will say is "surprise" in the
14 amendment of the Witness List.

15 Mr. Old, are you in a position to tell
16 me today how much time, if any, you need to alter or
17 prepare your voir dire?

18 MR. OLD: Your Honor, I think
19 -- and I have not -- it was handed to us, I don't know
20 when -- Lance got it, he handed it to me right after we
21 got underway. I haven't really had an opportunity to
22 look over the information that was provided.

23 THE COURT: Okay.

24 MR. OLD: I think I'm talking
25 about a matter of 15 or 20 minutes to look it over.

1 THE COURT: We have a juror
2 scheduled to arrive at 11:00 o'clock, it is five minutes
3 until 10:00, how about an hour and five minutes?

4 MR. OLD: I can do it quicker
5 than that, Your Honor, I think and I will tell the Court
6 my position on this.

7 THE COURT: "10:30?"

8 MR. OLD: That's more than
9 -- I think more than enough time. Could we --

10 THE COURT: We will recess.

11 MR. OLD: Nobody's leaving the
12 courthouse, I will tell the Court when I have completed.

13 THE COURT: We will recess
14 until 10:30, if we get ready before that we will get
15 everybody rounded up and back in the courtroom.

16 MR. OLD: Let's go in here.

17
18 (Record closed for October 12th, 1994.)

19
20 (Whereupon Court was recessed until
21 10:30 a.m., October 17th, 1994.)

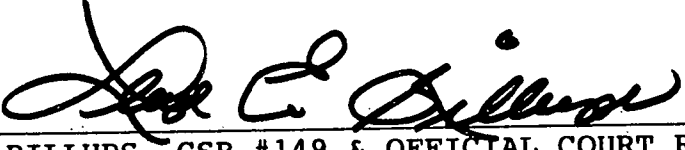
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1 STATE OF TEXAS §
 2 COUNTY OF TITUS §

3
 4 I, Lloyd E. Billups, CSR #149 and
 5 Official Court Reporter in and for the 76th Judicial
 6 District, State of Texas, do hereby certify that the
 7 above and foregoing contains a true and correct
 8 transcription of the proceedings in the above-styled and
 9 numbered cause, all of which occurred in open court or
 10 in chambers on October 12, 1994 and were reported by me.

11 I further certify that this
 12 transcription of the record of the proceedings truly and
 13 correctly reflects the exhibits, if any, offered by the
 14 respective parties.

15 WITNESS MY HAND this 31ST day of
 16 January, 1995.

17 
 18 LLOYD E. BILLUPS, CSR #149 & OFFICIAL COURT REPORTER
 19 76TH JUDICIAL DISTRICT, STATE OF TEXAS
 20
 21
 22
 23
 24
 25

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